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IN THE
Supreme Court of the United States

JULIANNE M. BOWLER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS AND PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Petitioner,

v.

UNITED STATES AND JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioner incorporates the corporate disclosure statement made in the Petition for Writ of Certiorari and states that it is current.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

PETITIONER'S REPLY BRIEF 1

I. CONTRARY TO THE UNITED STATES' NEW SUGGESTION, THE DECISION OF THE COURT OF APPEALS PREVENTS THE PAYMENT OF POLICYHOLDER CLAIMS IN STATE INSURER LIQUIDATION PROCEEDINGS. 1

II. THE UNITED STATES FAILS TO ADDRESS THE APPLICABLE MCCARRAN-FERGUSON STANDARDS AS ARTICULATED IN *FABE* AND APPLIED CORRECTLY BY OTHER COURTS OF APPEALS. 5

III. THERE IS NO JURISDICTIONAL BARRIER TO REVIEW BY THIS COURT: THE COMPLAINT IS NOT BARRED BY SOVEREIGN IMMUNITY BECAUSE IT ALLEGES THAT A FINAL ACTION OF THE ATTORNEY GENERAL EXCEEDS HIS AUTHORITY UNDER FEDERAL LAW. 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

Board of County Comm'rs v. United States,
308 U.S. 343 (1939) 10n

Boozell v. United States,
979 F. Supp. 670 (N.D. Ill. 1997) 9

Dugan v. Rank, 372 U.S. 609 (1963) 9

Fink v. O'Neil, 106 U.S. 272 (1882) 10n

Garcia v. Island Program Designer, Inc.,
4 F.3d 57 (1st Cir. 1993) 6

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 8-9

Lujan v. Defenders of Wildlife,
497 U.S. 871 (1990) 8

Malone v. Bowdoin, 369 U.S. 643 (1962) 9

Stanley v. Schwalby, 147 U.S. 508 (1893) 10n

United States Dep't of Treasury v. Fabe,
508 U.S. 491 (1993) 5, 6

United States v. Moriarty,
8 F.3d 329 (6th Cir. 1993) 4

United States v. Summerlin,
310 U.S. 414 (1940) 10n

CODES, STATUTES AND RULES:

United States Code

5 U.S.C. § 702 ..... 7, 8
5 U.S.C. § 706(1) 3
11 U.S.C. § 109(b) 10n
15 U.S.C. § 1011 ..... 10n
15 U.S.C. § 1012 ..... 10n
15 U.S.C. § 1012(b) 5
31 U.S.C. § 3713(b) 2, 4

Massachusetts General Laws

c. 175, § 180F 5

Supreme Court Rules

Rule 15.6 1
Rule 29.6 i

MISCELLANEOUS:

16 J. C. Moore, *et al., Moore's Federal Practice*, § 105.23 (3d ed. 2003) 9

PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, the Receiver submits this reply to address new arguments in the Brief for the Respondents in Opposition ("U.S. Br.").

I. CONTRARY TO THE UNITED STATES' NEW SUGGESTION, THE DECISION OF THE COURT OF APPEALS PREVENTS THE PAYMENT OF POLICYHOLDER CLAIMS IN STATE INSURER LIQUIDATION PROCEEDINGS.

After two years of litigation prompted by its refusal to waive claims and permit a policyholder level distribution, the United States now suggests that the absence of a claim filing deadline applicable to it does not prevent a receiver from paying policyholder creditors. It says that:

> Petitioners also indulge in hyperbole when they claim that the court of appeals' decision has the practical effect of preventing receivers from paying policyholder claims. . . . [T]he decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (*including those of the United States*).

U.S. Br. 17 (emphasis added); *see id.* at 13 (actual policyholders "should be unaffected by late-filed federal creditor claims"). This is flatly inconsistent with the United States' position throughout the liquidation proceedings that it has a statutory right to assert priority claims at any time. In a letter to the Receiver dated July 20, 1989, the Department of Justice stated:

> This letter constitutes notice to you, as the Massachusetts receiver, that the United States asserts priority status with regard to the debts due it from [American Mutual]. Priority status is asserted on behalf of the United States, its departments, agencies and instrumentalities.

> *Priority status extends to all claims in their full amounts previously and hereafter filed* against [American Mutual] and is based upon 31 U.S.C. § 3713 and any other federal statutes granting priority status. To the extent Massachusetts law is inconsistent with federal law in this regard, it is inapplicable.

C.A. App. 121 (emphasis added). In its motion to dismiss papers filed February 3, 2001, the Department of Justice stated it had made a "decision not to waive the United States' claims to the fifth distribution to the state guaranty funds." C.A. App. 126. If the United States were to agree that receivers can pay timely policyholder claims and not pay late filed United States policyholder claims without incurring liability under the Federal Priority Statute, it should say so in a clear, binding and public way, not in elusive statements in a brief opposing review of a contrary court of appeals decision.

The United States' discussion blurs the critical point that, under the Court of Appeals' decision, the States may commence liquidation proceedings for insolvent insurers, but they cannot pay policyholder claimants until the United States decides to permit payment. If the Federal Priority Statute preempts state claim filing deadlines, a receiver who distributes assets to policyholders faces personal liability under the Federal Priority Statute for unpaid late United States policyholder claims. *See* U.S. Br. 2 (quoting the personal liability provision of 31 U.S.C. § 3713(b)). The practical effect of the decision is to prevent state insurance commissioners as receivers of insolvent insurers from paying policyholder claims without first obtaining a waiver from the United States. As shown in the brief *amicus curiae* of the National Association of Insurance Commissioners, delays in payment will harm policyholder claimants in insurer liquidation proceedings across the nation – the policyholders in-

tended to be protected by the claim filing deadline statutes enacted in every state. *See* Pet. App. 60a.[1]

This case shows that the United States will in fact prevent payments to policyholder claimants by ignoring and refusing requests by state insurance commissioners appointed as receivers by the state courts. The Receiver made a proposal to defer the dispute while permitting policyholder distributions on September 16, 1998, Pet. App. 67a, and requested a conditional waiver to permit a $10 million policyholder level distribution on May 14, 1999, C.A. App. 147, but the United States would not respond. C.A. App. 57. The United States' suggestion (U.S. Br. 18) that the Receiver should have "sought the United States' cooperation" during the lawsuit ignores this history of disregard. Count III of the Receiver's November 22, 2000 complaint sought to "compel agency action unreasonably delayed" under 5 U.S.C. § 706(1), which finally prompted the United States to announce a "decision not to waive its claims" in its motion papers. C.A. App. 126. The intimation (not based on the record) that the United States might seek to moot the case (U.S. Br. 18) should be put aside. The simple response is that it has not done so. Belated telephone calls made days before the due date for its brief in opposition in this Court merely confirm that the United States is moved only by litigation deadlines.[2]

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[1] The plan of liquidation for American Mutual providing that late filed claims would be denied was approved by the Single Justice of the Massachusetts Supreme Judicial Court on June 28, 2002.

[2] The United States has not waived claims to permit a distribution to policyholders or offered to agree to the Receiver's earlier pre-suit proposal, which in any event, sought to defer, not resolve, this dispute and expressly reserved the issues for future litigation. Pet. App. 67a, 71a-72a. It is now too late to defer litigation, and the decision of the Court of Appeals will prevent distributions in the American Mutual and other pending Massachusetts insurer liquidation proceedings. This case presents a live and important controversy.

The United States attempts to downplay the potential liability of receivers who pay policyholders without a waiver (U.S. Br. 17-18), but its assertions only underscore the risks of making a distribution without federal approval. The United States first suggests that receivers will be protected by federal limitations periods. However, it cites cases (U.S. Br. 17 n.8) showing that a receiver is at risk of a United States claim under the Federal Priority Statute for six years *after* making a distribution. *E.g.*, *United States v. Moriarty*, 8 F.3d 329, 332-333 (6th Cir. 1993) (United States has six years after debtor's representative makes payment to bring action under 31 U.S.C. § 3713(b)). Decisions holding that the United States has six years to sue after a distribution provide no comfort to receivers who want to pay policyholders.

The United States also asserts that receivers can protect themselves by examining insurers' policy records. But those records will not necessarily reveal even pending claims by the United States against policyholders, much less unasserted or unknown claims. Claims like the Environmental Protection Agency's claim for recovery of an insured's environmental liabilities under the Superfund statute – a policyholder level claim, *see* Petition at 5, that asserted priority under the Federal Priority Statute (C.A. App. 89) – can seek large amounts and take years to emerge. Indeed, thirteen years after the liquidation began, the Department of Justice explained to the Court of Appeals in this case that the United States was "concerned that the remaining assets of the insolvent companies might not be sufficient to cover its claims." C.A. U.S. Br. 8 (April 16, 2002).

In sum, the unlimited exemption from deadlines asserted by the United States and accepted – but described as "simply terrible public policy" (Pet. App. 16a) – by the Court of Appeals harms policyholders by preventing payment and warrants review.

II. THE UNITED STATES FAILS TO ADDRESS THE APPLICABLE MCCARRAN-FERGUSON STANDARDS AS ARTICULATED IN *FABE* AND APPLIED CORRECTLY BY OTHER COURTS OF APPEALS.

The United States contends that the First Circuit was correct because state claim filing deadlines "benefit policyholders only to the degree that they benefit creditors generally." U.S. Br. 13. There are two responses to this argument. *First*, the claim filing deadline benefits policyholders more than others because it permits payments to policyholder creditors, and those creditors are preferred over others by state priority statutes. Since policyholders are the first class of creditors paid after administrative expenses under state priority statutes, *see* Pet. App. 62a (listing "*Fabe*-cured" state priority statutes), *e.g.*, Mass. G.L. c. 175, § 180F, policyholder claimants necessarily benefit to an extent greater than other creditors, who will be paid only after policyholders are paid in full. *See id.*; Pet. App. 10a. Indeed, because of the limited assets in the American Mutual liquidation, creditors below the policyholder level will receive nothing.

Second, *Fabe* did not require that policyholders be the *only* ones to benefit from a state provision for the statute to be protected from preemption by McCarran-Ferguson. If that were the case, then the administrative priority upheld by the Court in *Fabe* would have been preempted because the administration of a liquidation proceeding potentially benefits all creditors. The Court, however, found that the administrative expense priority was "reasonably necessary to further the goal of protecting policyholders" and therefore enacted "for the purpose of regulating the business of insurance" within the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 (1993); *see* Pet. App. 10-11a.

The Court of Appeals for the First Circuit has now twice failed to apply the "reasonably necessary to fur-

ther the goal" test applied in *Fabe*. In this case, it adhered to *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) (Breyer, C.J.), which it quoted as saying that the filing deadline was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." Pet. App. 15a, quoting 4 F.3d at 62. *Fabe*, however, required only that a state statute be "reasonably necessary to further the goal of protecting policyholders," not that it "primarily help" or be only "directed at" or "necessary" to protect them. 508 U.S. at 509. Only where a state provision "is designed to further the interests of other creditors" is it outside the protection of McCarran-Ferguson. *Fabe*, 508 U.S. at 508.

The United States' departure from the clear terms of *Fabe* underscores the need for review by the Court to provide clear guidance to the lower federal courts concerning application of the McCarran-Ferguson Act to insurer liquidations. The United States does not address the fact that the courts of appeal for the Fifth and Tenth Circuits reject the First Circuit's position that benefit to other creditors disqualifies a provision from protection under McCarran-Ferguson. Petition 23-24. The importance of the current split in the circuits is magnified by the number of insurer liquidations pending throughout the United States. Pet. 16-19. The briefs of *amici curiae* demonstrate the national interest in the resolution of the issue presented by the petition in this case. The brief in opposition of the United States only heightens the need for plenary review.

III. THERE IS NO JURISDICTIONAL BARRIER TO REVIEW BY THIS COURT: THE COMPLAINT IS NOT BARRED BY SOVEREIGN IMMUNITY BECAUSE IT ALLEGES THAT A FINAL ACTION OF THE ATTORNEY GENERAL EXCEEDS HIS AUTHORITY UNDER FEDERAL LAW.

The United States raises for the first time in this Court "a potential jurisdictional barrier to further review." U.S. Br. 18 (conceding that the "barrier" has "not yet [been] addressed by the parties or the courts"). However, there is no jurisdictional barrier to review by this Court because the complaint alleges and the record shows a final action by the Attorney General that the Receiver claims to exceed his authority under federal law. The complaint alleges that (1) the "United States has waived its immunity from this suit by 5 U.S.C. § 702," and (2) in any event, "this suit is not barred by sovereign immunity because it is one against a federal official claiming that she (the Attorney General) has acted beyond her statutory authority. *See Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949)." C.A. App. 10-11. Both of these grounds support the jurisdiction of the Court over the Petition.

First, this case falls within 5 U.S.C. § 702. The United States' contrary argument ignores the plain terms of the complaint and the findings of the courts below. The United States asserts that "petitioners do not challenge final agency action, or seek to have such action set aside." U.S. Br. 20. It further states that the complaint is "without regard to the propriety of any federal conduct." *Id.* These statements are incorrect. The complaint alleges that the "United States has taken the position that claims by it are not subject to time limits imposed by state law for claims against the estates of insolvent insurers." Compl. ¶ 17, C.A. App. 16. The complaint cites a letter from the Department of Justice to the Receiver asserting

the preemptive effect of federal law in this receivership. Compl. ¶ 16, Ex. B, C.A. App. 16, 27-28. The declaration sought by the complaint rests on the theory that the action of the Attorney General regarding the receivership is "beyond [his] authority" under federal law. C.A. App. at 11.

The decisions below confirm that this action is one for non-monetary specific relief concerning the illegality of a final action of an officer of the United States. According to the Court of Appeals, the "United States has asserted throughout [the receivership] that . . . the one-year bar date does not apply to any of its claims." Pet. App. 4a. The Court of Appeals also noted that "[s]ome of the [United States'] claims were filed after the one-year deadline" established by the Massachusetts Supreme Judicial Court. Pet. App. 4a, 14a. *See also* Pet. App. 26a, 34a (District Court decision). Thus the undisputed facts concerning the pending claims and legal position of the United States establish final action subject to judicial review under 5 U.S.C. § 702. Contrary to the tardy argument of the United States, this is "agency action" that "affects" the Receiver in a "specified fashion" and is subject to "judicial review." U.S. Br. 20, citing *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 882 (1990).[3]

Second, even if 5 U.S.C. § 702 did not establish a waiver of sovereign immunity, this action properly proceeded under the authority of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690

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[3] The complaint further alleged in Count III that the United States had "failed to act" on the "Receiver's request for a conditional waiver regarding her proposed fifth distribution to guaranty funds." C.A. App. 16. The United States asserts incorrectly that this "allegation and the associated prayer for relief . . . were never addressed by any court." U.S. Br. 20 n.11, 6 n.2. The District Court ruled that the Receiver's request for an order compelling the Attorney General to act on the Receiver's fifth request for a waiver was "moot . . . because the United States through this litigation has denied her request." Pet. App. 46a n.30. Judgment on Count III entered accordingly. Pet. App. 51a.

(1949). Under "the so-called *Larson* exception, in certain circumstances, an action will not be considered against the United States, and thus will not be barred by sovereign immunity, if it is one for specific relief against the federal officers." 16 J. C. Moore, *et al.*, *Moore's Federal Practice*, § 105.23 (3d ed. 2003). "The prohibition on suits against the United States does not apply in suits in which plaintiffs sue for specific relief against federal officers, alleging either (1) that the officers have acted beyond their statutory authority or (2) that the statute conferring power upon the officers is unconstitutional." *Id.*, citing *Larson*, 337 U.S. at 689-690; *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647-648 (1962).

Here, the Receiver's complaint alleges that the Attorney General – in asserting to the Receiver and in the courts below that the United States is not bound by a state deadline for claims but rather is free to file claims against the estate at any time – has acted beyond his authority under federal law. Before this case reached this Court, the United States apparently viewed such a claim as not barred by sovereign immunity; in a similar case brought by the Illinois Commissioner of Insurance as receiver, the United States filed a two-count counterclaim against the Commissioner. *See Boozell v. United States*, 979 F. Supp. 670, 671-72 (N.D. Ill. 1997). In this case, the District Court noted that the United States "contend[ed] the issues [presented by the Receiver] are essentially questions of law *adequately framed by the complaint*[.]" Pet. App. 22a n.2 (emphasis added). In this Court, however, the United States has changed its position and raised an 11th-hour, "jurisdictional" point to avoid plenary review of a question that affects insurer insolvencies throughout the country. The Court should not permit unfounded "jurisdictional doubts" (U.S. Br. 21) to insulate the legal position of the United States from judicial review, particularly where, as here, the court of appeals has described that posi-

tion as reflecting "simply terrible public policy." Pet. App. 16a.[4]

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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[4] The United States also raises an argument based on the rule of immunity from statutes of limitation applied in *United States v. Summerlin*, 310 U.S. 414 (1940), that was rejected by the District Court (Pet. App. 34a-35a) and not separately addressed by the Court of Appeals. As the United States concedes (U.S. Br. 10), the rule is subject to modification by Congress. Pet. App. 15a. *See Stanley v. Schwalby*, 147 U.S. 508, 515 (1893). The Court has found congressional waiver and subjected the United States to state limitations on federal recovery of debts. *See Fink v. O'Neil*, 106 U.S. 272, 284-85 (1882); *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-53 (1939). The Court held, in effect, that the rule in *Summerlin* applies where a conflict exists between the interests of the United States and the States. Where, however, Congress authorizes state regulation of a particular subject, there is no such conflict. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012, and the exclusion of insurance companies from the Bankruptcy Code by 11 U.S.C § 109(b), reflect a congressional judgment that the state rule furthers national interests and that the general immunity of the United States from statutes of limitation is waived. *See* Pet. App. 35a.